No. 76-333

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

UNITED AIR LINES, INC.,
Petitioner,

v.

CAROLYN J. EVANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, AIRLINE INDUSTRIAL RELATIONS CONFERENCE, AND AIR TRANSPORT ASSOCIATION

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council, the Airline Industrial Relations Conference, and the Air Transport Association respectfully move this Court for leave to file the accompanying brief as *Amici Curiae* in support of the position of the petitioner, United Air Lines, in this case. In support of this motion the above-named associations show as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the respondent has advised that consent for the filing of this brief would not be granted. Counsel for the petitioner has given his written consent, which has been filed with the Clerk of the Court.

2. The questions presented for review in this case raise issues of substantial importance to the *Amici Curiae*. The first question concerns the proper application of a neutral date-of-hire seniority system under the terms of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, *et seq*). In this case the Court must consider whether the reemployment of a former employee with new date-of-hire seniority under a neutral seniority system permits the resurrection of that employee's time-barred claim for loss of seniority and pay arising from termination of that employee's prior employment. The petitioner also raises the question whether the collateral or lingering *effects* of a prior act of discrimination are, *in themselves*, acts of discrimination against an employee, permitting the filing of a charge at any time in the future regardless of how long ago the prior act of discrimination occurred.

3. The Equal Employment Advisory Council ("EEAC") is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government

policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Because of this interest, the EEAC sought and was granted permission to file a brief as *Amicus Curiae* in *Electrical Workers, IUE, Local 790* v. *Robbins & Meyers, Inc.*, (U.S. Sup. Ct. No. 75-1264), which also involved issues concerning Title VII's statute of limitations. Similarly, the EEAC has filed *amicus curiae* briefs in other cases now pending before this court. See *T.I.M.E.-D.C., Inc.* v. *Rodriquez* (Docket No. 75-672); *East Texas Motor Freight System, Inc.* v. *Jesse Rodriquez, et al* (No. 75-718).

4. The Air Industrial Relations Conference ("AIR Conference") is an unincorporated voluntary association of air carriers formed to facilitate the exchange of ideas and information among air carriers concerning industrial relations matters, to provide support and information services to air carriers in the industrial relations area, and to represent the member carriers with respect to legislative, judicial and administrative matters related to or affecting labor relations in the airline industry. The airlines' agreements establishing AIR Conference have been approved by the Civil Aeronautics Board, pursuant to Section 412 of the Federal Aviation Act,[1] and, upon review, by the Court of Appeals for the District of Columbia Circuit.[2] AIR Conference presently has 21

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[1] CAB Orders 73-6-96 (June 22, 1973), 73-9-15 (September 6, 1973), and 76-5-12 (May 5, 1976).

[2] *Air Line Dispatchers Assn.* v. *Civil Aeronautics Board*, 506 F.2d 1321 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 988 (1975).

members, including most of the U.S. trunk and local service air carriers.[3]

5. The Air Transport Association ("ATA") is an organization of major domestic and international U.S. airlines employing hundreds of thousands of employees in the airline industry throughout their route systems.[4] Various constituent members of the ATA have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning

[3] Present members of AIR Conference include: Air New England, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Texas International Airlines, Inc., United Airlines, Inc., Western Airlines, Inc. and Wein Air Alaska, Inc. Trans World Airlines, Inc. also is a member of AIR Conference but is filing a separate motion and brief *amicus curiae* on its own behalf.

[4] Present members of the ATA include: Air Canada, Alaska Airlines, Inc., Allegheny Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Braniff International, CP Air, Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Air, Hughes Airwest, National Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Southern Airways, Inc., Texas International Airlines, Inc., United Airlines, Inc., Western Air Lines, Inc., Wein Air Alaska, Inc. Delta Air Lines, Inc., Pan American World Airways, Inc. and Trans World Airlines, Inc. also are ATA members but are filing separate motions and briefs *amicus curiae* on their own behalf.

the statute of limitations of Title VII and neutral seniority systems.

The views of certain members of ATA have been accepted previously by this Court in another Title VII case. See *Liberty Mutual Insurance Co.* v. *Wetzel, et al.*, (No. 75-1245).

6. The *Amici Curiae* and their constituent members have hundreds of thousand of employees who are covered by the provisions of Title VII of the Civil Rights Act of 1964. Most of these employees—and particularly airline flight personnel—also are covered by neutral date-of-hire seniority systems similar to that involved in these proceedings. Seniority systems such as these govern many aspects of such employees' professional careers with their employers. The Court's decision in this case could have a major impact on these companies, their employees, and their relations with their employees' collective bargaining representative. Accordingly, the *Amici Curiae* have a direct interest in the issue presented here for the Court's consideration.

7. The associations joining this motion have a broad knowledge of issues concerning the application of Title VII and its limitations period to seniority systems such as that involved in this case. Because of this background, the associations joining herein are uniquely situated to brief this Court on the practical, as well as the legal, aspects of the issues presented here.

WHEREFORE, it is respectfully moved that the above-named associations be granted leave to submit the accompanying brief as *Amici Curiae* in this case.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, AIRLINE INDUSTRIAL RELATIONS CONFERENCE, AND AIR TRANSPORT ASSOCIATION

INTEREST OF THE *AMICI CURIAE*

This brief is submitted pursuant to Rule 42(2) and (3) of this Court. The Equal Employment Advisory Council ("EEAC"), the Airline Industrial Relations Conference ("AIR Conference"), and the Air Transport Association ("ATA"), the *Amici Curiae*

herein, have a substantial interest in the outcome of this case. As indicated more fully in the accompanying motion to file this brief, the *Amici* and their members or constituents, have hundreds of thousands of employees throughout the country who are covered by the provisions of Title VII of the Civil Rights Act of 1964. Most of these employees—and particularly airline flight personnel—are also covered by collective bargaining agreements containing neutral date-of-hire seniority systems which govern many aspects of such employees' professional careers with their employers. As such, the *Amici Curiae* have a direct interest in the basic issue here presented for the Court's consideration, to wit:

> Whether or not the rehiring of a formerly terminated employee and the assignment to her of her new date-of-hire place in her employer's neutral date-of-hire seniority system (instead of awarding her seniority based upon her original date-of-hire) constitutes a new discriminatory act in violation of Title VII or perpetuates the effect of her prior allegedly unlawful termination so as to revive her right to litigate the legal propriety of that termination otherwise long since barred by Title VII's applicable statute of limitations.

SUMMARY OF THE ARGUMENT

An employee's place in a date-of-hire seniority system will generally govern, among other things, each employee's job assignments, compensation, eligibility for transfer or promotion, liability to layoff, and order of recall throughout his or her employment. Thus the correctness of an employee's place in that seniority

system is of great importance not only to the individual employee involved but also to his or her fellow employees whose relative seniority positions and future opportunities will be affected by any alteration in the seniority order. It is equally important to the employer who may, under the decision below,[1] be held liable to an employee because of any damages suffered from the employee's allegedly wrongful placement in the seniority system. Likewise, the employees' collective bargaining representative also has a stake in the integrity of the seniority system contained in its contract with the employer.

The *Evans* II decision below treats as a litigable claim an entirely discrete, non-discriminatory seniority assignment upon rehire as the perpetuation of a claimed prior unlawful termination long since barred by the statute of limitations. In so doing, the decision destroys Title VII's statute of limitations in rehire and similar situations; promotes uncertainty in one of the most sensitive areas of employee relations—seniority; abrogates the Congressional policy of prompt resolution of discrimination claims; and subjects employers to liability of unknown extent resulting from future claims for damages caused by allegedly unlawful placement in seniority systems which, under *Evans* II, may remain latent but alive throughout the claimant's employment, subject to assertion or non-assertion at the claimant's whim.

For these reasons, employers and their employees have a vital interest in the reversal of this case

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[1] *Evans* v. *United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976) ("*Evans* II").

and in a decision from this Court which—while preserving each employee's right to challenge an allegedly discriminatory act (including the propriety of his or her place in a neutral seniority system) within the statutory time fixed by Congress—effectuates the time limits within which Congress has required such challenges to be made. Such a decision would uphold the Congressional policies described above and protect the legitimate interest of employers and fellow employees in the correctness and reliability of the seniority systems which govern their relationships and opportunities.

THE PROCEEDINGS BELOW

A) The Facts

As set forth in detail in *Evans* v. *United Air Lines, Inc.*, —— F.2d ——, 12 FEP 288 (7th Cir. 1976) ("*Evans* I"), between November 1966 and February 1968 Evans was a stewardess for United Air Lines ("UAL"). At that time UAL required married stewardesses to resign their employment, and in February 1968 Evans was involuntarily terminated by UAL because of her marriage. On November 7, 1968, UAL discontinued its policy of requiring stewardesses to remain unmarried. After her termination in February 1968 Evans had no employment relationship of any kind with UAL until February 1972.

On February 16, 1972, four years after her termination, Evans—never having filed any charge of discrimination against UAL—was again hired by UAL as a stewardess. She was given the regular training for newly hired stewardesses which she completed on March 16, 1972. Evans was then assigned seniority

in UAL's admittedly non-discriminatory date-of-hire seniority system as of her 1972 date of hire, as were all the other new hires who completed the training with her. In accordance with its policy of giving both men and women seniority credit only for "continuous time in service," UAL did not give Evans seniority credit for her prior employment as a stewardess.

On February 21, 1973—five years after her original termination, four years after UAL had eliminated its no-marriage-for-stewardesses policy, and at least eleven months after Evans had been re-employed and received her new seniority place in a sexually neutral and non-discriminatory seniority system (see above) —Evans filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that her *1968* termination was an unlawful discriminatory practice based on sex and demanding the "seniority and back pay" that she lost by reason of that termination [Appendix (hereinafter "App.") 21]. Following receipt of an EEOC "right to sue" letter, Evans filed suit against UAL to obtain seniority credit for her pre-termination employment and other requested relief.

B) Evans I

UAL moved to dismiss that suit on the ground that Evans's 1973 EEOC charge was untimely by many years since, before 1972, Title VII then required such a charge to be filed within 90 days of the alleged discriminatory practice, *viz.*, the 1968 termination;[2] that Evans had lost both employment and seniority

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[2] Even if the 1972 extension of the limitation period to 180 days were applicable to this suit, Evans's charge would still have been untimely. *See* pp. ~~2-4~~ 4-5, above.

as of that date; that she thereafter had no employment relationship of any kind with UAL until February 1972; and that her 1972 rehire as a new employee did not alter those facts since the two employments were entirely separate. Evans claimed that her charge was timely since UAL's refusal to accord her upon rehire in 1972 seniority credit for her pre-termination service perpetuated *up to the time of suit* the prior unlawful 1968 termination. The District Court agreed with UAL and dismissed the complaint. On appeal, the Court of Appeals for the Seventh Circuit in *Evans* I affirmed the District Court (Cummings, J., dissenting) (see App. 20-30).

The majority in *Evans* I, citing *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. den.* —— U.S. ——, 44 USLW 3670 (1976), and *Collins* v. *United Air Lines*, 514 F.2d 594 (9th Cir. 1975), held that, since UAL's 1972 assignment of seniority to Evans was *itself* a non-discriminatory act based on UAL's admittedly non-discriminatory policy of allowing seniority only for "continuous service," that assignment did not perpetuate any alleged past discrimination against Evans "in the sense required to constitute a violation of Title VII" (App. 27). It specifically adopted the Ninth Circuit's ruling in *Collins, supra,* that "the alleged unlawful act or practice—*not merely its effects*—. . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC" (App. 25-26; emphasis supplied). Holding that Evans's 1972 rehire did not alter the fact that the *1968* termination was a separate and *completed* act, the Court concluded that since there was "no continuing discriminatory practice with respect to Evans, her only

basis for charging discrimination as a result of United's no-marriage policy is the termination in 1968" and a suit based on that was barred by Title VII's statute of limitations (App. 27-28). Given the discrete nature of the first and second Evans employments, *Evans* I appears clearly correct.[3]

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[3] Judge Cummings's dissent was based upon his view that the application of UAL's non-discriminatory policy of allowing seniority credit only for "continuous service" gave "collateral effect to [a] past act of discrimination," which discrimination was "the proximate cause of the disparity complained of by plaintiff" (App. 27, 28). The dissent ignored the fact that for the four years between her termination and her rehire Evans had failed to file any charge with respect to her 1968 termination and the further fact that 90 days after that termination Evans had lost any right to do so. Judge Cummings concluded, however, that her rehire (as a new employee) in 1972 revived that theretofore expired right simply because, upon rehire, UAL applied to Evans the same "continuous service" seniority policy it applies to every flight attendant, male or female (App. 23-24, including ftnote 4).

Judge Cummings accepted with equanimity the holding of *Collins* v. *UAL, supra,* that Mrs. Collins should *lose* her "termination-for-marriage" suit against UAL because she had failed to challenge her termination within the 90-day period and UAL had never rehired her. At the same time he would have permitted Mrs. Evans to *win* her "termination-for-marriage" suit against UAL (although she too had failed to challenge her termination within the 90-day period) only because UAL had been unwary enough to rehire her and thus—according to Judge Cummings—to revive her obviously barred claim (see App. 30). He dismissed as inconsequential the chilling effect that success for his view would almost certainly have on the rehire of former employees (see App. 25, 30, majority ftnote 5 and dissent ftnote 2).

Judge Cummings also ignored the possibility UAL might have been subject to serious challenges by other employees

C) Evans II

Thereafter, petitions for rehearing by the panel and *en banc* were filed, during the consideration of which this Court decided *Franks* v. *Bowman*, 424 U.S. 747 (1976). "In view of [that] decision" (App. 35), the panel which had decided *Evans* I reheard the case and reversed its opinion (see *Evans* II, *supra*).

For all practical purposes, the statements of facts and of the contentions of the parties in *Evans* I and *Evans* II are identical. However, in describing UAL's contention that "the only legally cognizable injury to Evans was her termination of employment and seniority in 1968," the court in *Evans* II added, gratuitously and apparently with no support in the record, that "[i]n this respect United's argument would appear to rest, *sub silentio*, on the protection afforded bona fide seniority systems by section 2000e-2(h)" (App. 36).[4] The Court then summarized UAL's remaining contentions as arguing that (1) since UAL's "continuous time-in-service" seniority policy is neutral with regard to sex, that policy does not violate Title VII and any actionable injury to Evans "stems from her termination in February, 1968, *whereby she lost her initial seniority*"; and that, (2) since her time to complain against that termination and loss began to run in *1968*, any complaint about that loss was long since barred in 1973 (App. 37; emphasis supplied).

if it had disregarded for Mrs. Evans the "continuous service" seniority requirement which it applied to all other persons with breaks in service.

[4] UAL had no need for the alleged "protection" of Section 703(h) since its whole position was unassailable without it: (1) Evans was terminated in February 1968 and her employment and seniority then ceased; (2) it is well settled that discriminatory termination is a completed act at the time thereof and must be complained about within the statutory period; (3) Evans did not complain within that period; (4) Evans was not an employee of UAL for the next four years and had no employee rights or benefits of any kind; (5) when Evans was rehired in 1972 it was as a new employee; (6) *all* new employees, male and female, receive seniority as of date of hire: therefore, Evans suffered no discrimination by the 1972 seniority award. No resort to Section 703(h) is necessary to establish UAL's case (see *Evans* I, *supra*, *passim*).

The court, having itself injected Section 703(h) into the *Evans* II case, then proceeded to consider the holding of *Franks* v. *Bowman* with respect to that Section. It correctly paraphrased *Franks* as holding that Section 703(h) did not preclude the grant of retroactive seniority under a facially neutral seniority system *"as a form of relief"* where the individual complainants *"could prove"* that they had been the actual victims "of discriminatory hiring practices" (App. 37; emphasis supplied). The remainder of the court's comments about *Franks* consists of references to discrimination as a "complex and pervasive phenomenon" and to the Title VII objective of "make whole" relief (App. 38).

Asserting that it was "in the context of" that analysis of *Franks* that the court must consider whether or not Evans's complaint was filed "within 90 days of a violation of Title VII," the court stated that that depended upon whether *Section 703(h)* "may be used to interpose a legal bar to Evans's theory

that the perpetuation of past discrimination through United's current seniority policy constitutes a continuing violation of Evans's Title VII rights" (App. 39).[5] The court recited the obvious facts that a "seniority policy that credits only continuous time-in-service" necessarily adversely affects rehired employees as against those continuously employed; that thus a previously terminated employee who is later rehired will encounter these adverse effects; and that such rehired employees might include one previously improperly terminated. The court then leapt to the conclusion that the routine application to a rehired employee of an unexceptionable seniority policy (applicable to *every* employee, male or female, long-term, new hire, or rehire) constitutes unlawful "perpetuation" of the previous unlawful termination. It cited the "teaching of *Franks*" as confirming "these holdings" and concluded that, therefore, Section 703(h) "cannot be used" to bar Evans's claim (App. 40), although UAL had never claimed it did (see page 9 above). Accordingly, the Circuit Court reversed its earlier position and decided that Evans's claim concerning her 1968 termination could be maintained.

THE POSITION OF THE *AMICI CURIAE*

It is the position of the *Amici Curiae* that the decision in *Evans* II is incorrect and must be reversed. In misconstruing this Court's decision in *Franks* v. *Bowman*, the Seventh Circuit effectively repeals Title VII's statute of limitations in cases of barred claims of alleged discriminatory employ-

[5] The significance of the court's injection of Section 703(h) into the case now becomes apparent.

ment termination followed by later rehire in contravention of Congress's obvious intent that charges of discrimination be brought and resolved promptly (see Point I, below). In addition, the decision, if allowed to stand, necessarily leads to illogical and inequitable differentiations in termination cases and is inconsistent with important practical and equitable considerations in matters of seniority in ways which will adversely affect both employers and employees (see Point II, below).

Evans's suit is barred because she did not file a timely charge with the EEOC concerning "the underlying legal wrong" about which she now complains—her involuntary termination in 1968 for violation of UAL's no-marriage policy for stewardesses.[6] Her rehire in 1972 did not revive her previously barred claim and every logical, practical, and equitable consideration, as well as proper principles of judicial administration and economy, support the conclusion that her present seniority is proper and legal, and *Franks* v. *Bowman* does not require that it be disturbed.

ARGUMENT

I. EVANS I CORRECTLY APPLIED TITLE VII'S STATUTE OF LIMITATIONS TO BAR EVANS'S PRESENT CLAIM AND FRANKS v. BOWMAN DOES NOT REQUIRE OR COUNTENANCE THE DECISION REACHED IN EVANS II.

As set forth at pages 6-7, above, *Evans* I, relying upon *Waters* v. *Wisconsin Steel Works*, *supra*, and *Collins* v. *United Air Lines, Inc.*, *supra*, held that Evans's 1968 termination was a separate and dis-

[6] *See, Franks* v. *Bowman, supra*, 424 U.S. at 758.

tinct act, a complaint about the alleged discriminatory nature of which had to be filed within the 90 day period then required by Title VII, Section 706(e), 42 U.S.C. § 2000e-5(e). It further held that failure so to file a charge within that statutory period extinguished Evans's right thereafter to litigate any claim she previously had had as to the propriety of that termination.

Based upon that reasoning, the court rejected Evans' contention that UAL's assignment of 1972 seniority to her on the occasion of her rehire in that year constituted a current violation of Title VII because, by denying her the seniority lost upon her prior termination, UAL continued into the present the illegality of that termination. *Evans* I held, with *Collins*, that the discriminatory act actually complained of must have occurred within the statutory period in order to support a suit based thereon and that a non-discriminatory act which was merely an "effect" of the prior barred violation could not bring forward into the present the basic underlying legal wrong of which she actually was complaining.[7] Since the rationale and basis for the conclusions reached in *Evans* I are compellingly contained therein, it seems unnecessary to elaborate upon them here.[8]

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[7] While Evans seeks to state her claim in terms of "a continuing violation," it is logically impossible to conceive of it in "continuing" terms. It can really only be stated as the *revival* of an extinguished claim by virtue of the occurrence of a discrete and separate circumstance (in this case rehire) which happens to involve a nondiscriminatory act which is different in its scope and consequences because of the prior termination but is otherwise entirely unconnected with it.

[8] It is, however, interesting—and probably not without significance—to note the similarity between the emphasis in *Collins* and *Evans* I upon the centrality of the "alleged unlawful act or practice—not merely its effects" and the concept of "the underlying legal wrong" subsequently relied on by this Court in reaching its decision as to *remedy* in *Franks* v. *Bowman*.

Franks v. *Bowman* not only does not require the contrary conclusion to *Evans* I which the Seventh Circuit, in *Evans* II, considered that it did, but, in fact, supports that court's original decision. In completely abandoning its first opinion, the Seventh Circuit stated that "[t]he teaching of *Franks*" confirmed its holdings in *Evans* II that, since the application of a non-discriminatory continuous time-in-service seniority policy to a rehired employee previously terminated on time-barred discriminatory grounds adversely affects that employee because of the prior termination, application of that seniority policy "is deemed to be discriminatory." Thus, although "facially neutral," the application of such a seniority policy makes Evans "the victim of current discrimination" (App. 37, 39, 40). But *Franks* "teaches" no such things.

First, *Franks* teaches that Section 703(h)—[which the *Evans* II panel, not UAL, invoked (see pages 8-9, above)] provides that operation of a facially neutral seniority system is *not* a violation of Title VII merely because it perpetuates the effects of pre-Act discrimination. This Court concluded that Section 703(h) was "only a definitional provision" aimed at "defining what is and what is not an illegal discriminatory practice" if post-Act operation of a seniority system is challenged as perpetuating the effects of pre-Act discrimination (see 424 U.S. at 758, 761). In other words, as described by Mr. Justice Powell

(concurring in at least this aspect of the decision), this Court held that Section 703(h) insulates "an otherwise bona fide seniority system from a challenge that *it* amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination" (*id.* at 781; emphasis supplied.)[9]

Second, it teaches that if an individual *can prove* that he or she was a victim of a discriminatory refusal to hire that individual *may*, if appropriate, receive, among other things, an adjusted "rightful" place in the seniority system as a *remedy* for the proven discrimination. This Court held that, since the "*underlying legal wrong*" about which the plaintiffs were complaining was the prior discriminatory refusal to hire and *not* the "alleged operation of a racially discriminatory seniority system," Section 703(h), as the Court had interpreted it, did not prohibit seniority adjustments within the seniority system, *as a matter of remedy*, "once an illegal discriminatory practice occurring after the effective date of the Act is *proved—as in the instant case, a discriminatory refusal to hire*" (*id.* at 758, 762; all emphasis supplied). Thus, under *Franks*, the critical factor must be the ability to *prove* the prior discriminatory practice. Nowhere does *Franks* "teach",

[9] It is apparent throughout the *Franks* opinion that when the Court is speaking of a *bona fide* seniority system or of "the existing seniority system" it is speaking of a system, like the UAL one in this case, which was non-discriminatory in langauge and application, was not the result of an intention to discriminate on any prohibited ground, and in which petitioners sought, as Evans does here, the seniority they would have enjoyed were it not for the discriminatory acts about which they were complaining (see 428 U.S. at 758).

or even intimate, either that the routine assignment of actual date of hire (or rehire) seniority in a facially neutral seniority system *itself* constitutes a violation of Title VII or that such routine assignment "perpetuates" an otherwise barred "underlying legal wrong" so as to "unbar" it.[10]

The clear implication of the *Franks* decision is that the operation of any *bona fide* seniority system is not *itself* a violation of Title VII, but that *if* a prior substantive Title VII violation can be proven (which Evans's by reason of untimeliness cannot) appropriate adjustments in the successful complainant's place within that system may be made to remedy that *prior* violation. By reviving Evans's long-barred claim of prior illegal termination by means of calling the routine operation of a *bona fide* system ~~of~~ unlawful "perpetuation" of that previous discrimination, *Evans* II has converted the availability of a *remedy* into the substance of a *wrong*. By this reasoning, the court has perverted *Franks* from a salutary vindicator of the Congressional objective of providing "make whole" relief for

[10] Such results are particularly difficult to accept in the *Evans* case where suit upon her *termination* was (like the complainant's in *Collins* v. *UAL*, *supra*) clearly barred 90 days after the termination. Thereafter, no employment relationship existed between Evans and UAL nor did any right to complain to the EEOC about the former relationship. How then can the routine act of conferring date-of-hire seniority upon Evans, as upon any other rehire, itself become an unlawful employment practice as to her alone when she had long since forfeited her right to complain about the prior termination? Or how can that routine non-discriminatory act "perpetuate" as to Evans a prior discrimination as to which she had long since lost her right to sue? That could be nothing but "revival" and *Franks* v. *Bowman* permits no such thing.

still viable "underlying legal wrongs" into an instrument for frustrating the Congressional provision that discrimination charges should be brought and disposed of promptly [see Title VII, § 703(g); 42 U.S.C. § 2000e-2(h)].

In *Franks*, this Court ordered events correctly: *if* a plaintiff could prove the underlying legal wrong, *then* a Court might order changes in plaintiff's place in a seniority system. But *Evans* II has turned *Franks* v. *Bowman* upside down. There, the Seventh Circuit held that *if* a plaintiff seeks a change in her place in a seniority system assigned pursuant to a non-discriminatory policy but unsatisfactory to her because of a prior but barred underlying legal wrong, *then* the plaintiff may avoid the statute of limitations and litigate her case about that underlying wrong. If the "rationale" of *Evans* II prevails, there is no effective statute of limitations for cases of alleged prior discriminatory acts followed by later hire or rehire—a result never contemplated by this Court in *Franks* v. *Bowman*.

For the above reasons, *Evans* II—decided on a ground not urged by UAL, entirely unsupported by *Franks* v. *Bowman*, conducive to future reluctance to hire or rehire, and impossible to reconcile with Title VII's statute of limitations—should be reversed by this Court.

II. THE PURPOSES DESIGNED TO BE SERVED BY THE TITLE VII STATUTE OF LIMITATIONS AND OTHER PRACTICAL AND EQUITABLE CONSIDERATIONS REQUIRE REVERSAL OF EVANS II.

It has long been recognized that the purpose of Title VII's relatively short statute of limitations is to

require the prompt filing and resolution of charges of discrimination in order to serve everyone's valid "interests in prohibiting the prosecution of stale [claims]" [see, *e.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 464 (1975); *Hecht* v. *Cooperative for American Relief Everywhere*, 351 F. Supp. 305, 310 (S.D.N.Y. 1972)]. Such prompt filing not only facilitates effective investigation of the alleged discrimination while memories are still fresh and witnesses and evidence current and available but also encourages prompt disposition of the same with consequent stabilization of the employment situation involved in the complaint to the advantage of the complainant, the challenged employer, and his other employees [see *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B.*, 362 U.S. 411, 419 (1960)] That Congress intended and still intends to put a sharp limit upon the period within which an aggrieved person can prosecute a discrimination claim or be forever barred therefrom is established by the fact that when Congress revised Title VII in 1972 it extended the period within which discrimination charges must be filed from 90 to 180 days, *but it did not abolish* it [compare 78 Stat. 253 (1964) with 86 Stat. 103 (1972); see *Local Lodge No. 1424, I.A.M.* v. *N.L.R.B.*, *supra*, at 428-429].

As noted above (see pages 11-12), *Evans* II effectively repeals Title VII's statute of limitations for filing charges with the EEOC [11] at least in cases of

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[11] The timely filing requirement of Title VII are widely held to be "jurisdictional" in nature [see, *e.g. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Collins* v. *United Air Lines, Inc.*, *supra*, 514 F.2d at 596].

alleged discriminatory terminations followed by rehire after the expiration of the statutory period of limitations. It does so by considering the formerly aggrieved person's new, but allegedly wrongful, place in a neutral seniority system to constitute a continuation of the previously barred unlawful termination as long as that allegedly wrongful place is not altered so as to remove any lingering effects from the prior termination.[12] This not only abrogates the Congressional intent embodied in the statute of limitations but also has other illogical and undesirable effects.

First, it illogically—and ironically—accords to unlawfully terminated employees who are fortunate enough to be rehired after the expiration of the statutory period of limitations apparently unlimited rights to litigate the legality of their previous termination. By sharp contrast, the filing rights of less fortunate employees identically terminated but not rehired are limited to the 180 days statute of limitations period after which their rights to complain are forever extinguished (compare *Evans* II with *Collins* v. *UAL*, *supra*). This is not only grossly unfair

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[12] According to *Evans* II it is the allegedly wrongful seniority date which effectuates the "continued" discrimination. The assignment of that date took place in March 1972 but the Seventh Circuit held timely Evans's complaint to the EEOC which was not filed until five months more than the allowed 180 days after the alleged discriminatory seniority assignment occurred. Therefore, it is apparent that under *Evans* II the *continued existence* of the seniority place prevents the running of the limitations period on both the allegedly wrongful seniority place *and* the underlying legal wrong. [but *cf. Bowen Products Corporation*, 113 NLRB 731, 732-733 (1955), cited with approval by this Court in *Local Union 1424, I.A.M.* v. *N.L.R.B.*, *supra*, at 420, including ftnote 12].

and entirely unsupportable as a legal position. It is also almost guaranteed to discourage employers from rehiring formerly terminated employees more than 180 days after their termination where there is any possibility that they may consider their prior termination to be tainted by unlawful discrimination (see *Evans* I majority opinion, App. 25; but see dissent, App. 30). Such a result is clearly not in the interest of the employer, the employees, or the general public.

Second, it leaves unsettled for an indefinite but apparently unlimited period the correctness and reliability of the seniority order governing the most essential aspects of the business lives of all employees covered by neutral date-of-hire seniority systems. If *Evans* II stands, any rehired employee, such as Evans, given seniority from his or her actual rehire date may at *any* time thereafter throughout his or her employment, challenge the propriety of that seniority on the basis of a prior allegedly discriminatory, but time-barred termination, and force a rearrangement of the seniority order on which his or her fellow employees had up to then reasonably relied for the future. No appropriate public policy is served by permitting the existence of such an open-ended disruptive right.

Third, the unlimited right of a rehired employee to challenge at any time during his or her employment the alleged discriminatory nature of a remote act which somehow adversely affected his or her place in a neutral date-of-hire seniority system, subjects the employer of any rehired employee to liability of unknown, and indeed unknowable, extent resulting from future claims for damages caused by allegedly unlawful placement in seniority systems. Such

claims, under *Evans* II, may remain latent but alive throughout the claimant's employment, subject to assertion or non-assertion at the claimant's whim (see *Bowen Products Corporation, supra*, 113 NLRB at 732). Here again, there is no rational justification for such a result and no appropriate public policy is served thereby.

Finally, *Evans* II—(as distinguished from *Evans* I, which also avoids all the above-described illogical and undesirable results)—promotes the absence of finality in cases of alleged discriminatory terminations and encourages belated and dubious challenges to the propriety of ostensibly non-discriminatory assignments of seniority in an admittedly neutral date-of-hire seniority system. As a result, *Evans* II undermines accepted principles of judicial administration and economy. It also needlessly directs judicial attention to suits involving long barred claims of prior discrimination somehow related to present non-discriminatory acts, rather than to suits concerning present discrimination not yet remedied.

CONCLUSION

Evans I was correctly decided. Its replacement by *Evans* II was improvidently effectuated by virtue of a misconstruction of *Franks* v. *Bowman*. Accordingly, *Evans* II should be reversed with appropriate directions to accomplish the dismissal of the complaint herein.

Respectfully submitted,

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